

**IN THE HIGH COURT OF JUDIATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

WRIT PETITION NO.2887 OF 1988

- | | |
|----------------------------------|----------------|
| 1. Vasantrao Udhavrao Shivale | |
| aged about 58 years | .. |
| 2. Amrutrao Udhavrao Shivale | |
| aged about 45 years | .. |
| 3. Smt.Laxmibai Udhavrao Shivale | |
| aged about 75 years | .. |
| All residing at and Post | |
| Mahalunge, Taluka Khed, | |
| District Pune | .. Petitioners |

Vs.

- | | |
|--|----------------|
| 1.Wamanrao Genuji Shirole since
deceased by his legal representatives | |
| A. Baburao Wamanrao Shirole | |
| aged about 55 years, residing at | |
| 144, Shivaji Nagar, Pune 411 005. | .. |
| 2. Kalyani Traders and Company | |
| 1231, Bhawani Peth, Pune 411 002 | |
| by its partners. | |
| A. Khashaba Bhikaji Dhore | |
| aged about 54 years, residing at | |
| 1231 Bhawani Peth Pune 411 002 | .. |
| B. Anandrao Sahebrao Khapade | |
| residing at 1231, Bhawani Peth, | |
| Pune 411 002 | .. |
| 3. Smt.Mayadevi Manikrao Shivale | |
| aged about 60 years | .. |
| 4. Vishwasrao Manikrao Shivale | |
| aged about 38 years | .. |
| 5. Prataprao Manikrao Shivale | |
| aged about 34 years | .. |
| 6. Sahebrao Manikrao Shivale | |
| aged about 24 years | .. |
| Nos.3 to 6 residing at and Post | |
| Mahalung, Taluka Khed, | |
| District Pune | .. Respondents |

Mr.K.Y.Mandlik for the petitioners.
Mr.Khadapkar for the respondents.

CORAM : D.B.BHOSALE, J.

DATED : 16TH SEPTEMBER, 2004

ORAL JUDGMENT:

. Heard Mr.Mandlik, learned counsel for the petitioners and Mr.Khadapkar, learned counsel for the respondent.

2. This petition raises a short yet important question as to whether interest of the tenant of non residential premises to which Bombay Rents, Hotel and Lodging House Rates Control Act, (57 of 1947) (for short "the Rent Act") applies is attachable and saleable in execution of the decree against the tenant.

3. The factual matrix that would be material for considering the aforestated question, in brief, is as follows: The petitioners and respondent nos.3 to 6 are the owners of the premises i.e. 1231, Bhavani Peth, Pune 411 002 (for short "the said premises"). The said premises were let out to M/s.Vinodchandra Kuberdas. One Dinkarrao Laxman Chandgude, respondent nos.2A and 2B were the partners of Vinodchandra Kuberdas. Admittedly, the premises were commercial premises. In 1977, the firm M/s.Vinodchandra Kuberdas was dissolved as per

the decree passed in Suit No.821 of 1976. In 1977, Kuberdas sublet the said premises to respondent nos.2A i.e. Khashaba Bhikaji Dhore. Respondent Nos.2A and 2B claimed to be the partners of the firm by name Kalyani Traders and Company which carries on business in eatable oil. There does not seem to be any dispute that respondent nos.2A and 2B are successors in title of Kuberchand and Company. The third partner of M/s.Kalyani Traders by name Dinkarrao Laxmanrao Chandgude is dead.

3.1 Deceased - Waman Genuji Shirole obtained a money decree in Suit No.720 of 1977 against M/s.Vinodchandra Kuberdas of which deceased - Dinkarrao Laxmanrao Chandgude and respondent nos.2A and 2B were partners. The decree was for Rs.19,115.00. The tenancy rights in respect of the said premises were attached and the attachment was directed to be continued till the realisation of the decretal dues. To satisfy the decree respondent no.1A, the sole heir of deceased Waman Shirole, filed Darkhast No.102 of 1986 for sale of tenancy rights in respect of the shop premises, goods therein, furniture etc. Respondent Nos.2A and 2B did not appear and contest the Darkhast. On 17.6.1986, respondent no.1A-decree holder informed

the court that he has no objection to sell tenancy rights of judgment debtor in the said house and requested to issue notice to petitioner nos.1 to 3 and to deceased - Manikrao Udhavrao Shivale, being the owner of the shop premises, stating that tenancy rights were being sold. The petitioners contested the Darkhast and objected attachment and sell of tenancy rights. After hearing the parties the Civil Judge, Senior Division on 22.4.1988 passed the following order:

"Heard Counsel of both the parties. The J.D. tenant remained absent. No counsel argued the case of J.D. After hearing the D.H. and third persons, Landlord, I am convinced that the property which can be attached can be transferred by sale. Hence, the prayer for selling the tenant's right is granted".

3.2 This order has been impugned in the present writ petition. The only contention urged by Mr.Mandlik, learned counsel for the petitioners is that the interest of a tenant of non-residential premises is not attachable and saleable in the execution of a decree against the tenant.

4. This Court in **Union Bank of India Vs. M/s.Mittersain Rupchand and Others 1995(2) Mh.L.J. 481** had an occasion to consider the similar situation and the provisions of section 60(1) proviso (kc) of the Rent Act. After considering the relevant provisions of the Code of Civil Procedure (for short "the CPC") and the Rent Act held that there is no bar under section 15(1) to attach and sell leasehold interest of lessee in premises leased out for non-residential purpose. The relevant discussion in paragraphs 4 and 6 reads thus:

"4. Section 60 of the Code of Civil Procedure, inter alia, provides that the land, house or other buildings and all other saleable property, movable or immovable, which is not specifically excluded is liable to attachment in execution of a decree. The section further prescribes that the saleable property must belong to the judgment debtor and over which or the profits of which the judgment debtor has a disposing power. Section then sets out the properties which are not

liable to attachment and sale and one of the category of such property is found in clause (kc). The clause prescribes that the interest of the lessee of a residential building of which the provision of law for the time being in force relating to control of rents and accommodation apply. It is therefore clear that the interest of a lessee in a residential premises and to which the provisions of Bombay Rent Act apply, is not liable to attachment and sale in execution. Mr.Shah submits, and in our judgment with considerable merit, that the exclusion of properties liable for attachment and sale refers specifically to residential premises and do not take into its sweep the premises used for non-residential purposes. It is not in dispute that the premises secured on lease by the Respondents were leased out for non-residential purpose and used for commercial purpose. The exclusion, therefore, clearly is not attracted.

"6. Sub-section (1) of section 15 of the Bombay Rent Act, which is set out

hereinabove, inter alia provides that it shall not be lawful for any tenant to sub-let the whole or any part of the premises or to assign or transfer in any other manner his interest therein. The plain reading of sub-section makes it clear that the prohibition is not absolute because it is always open to the parties to contract to the contrary as provided by the section. It is always open for the lessor and the lessee to contract that the lessee can sub-let the premises or assign or transfer in any other manner his interest therein. In other words the prohibition contained in sub-section (1) is not absolute. The section nowhere provides that the transfer shall be void. The proviso of the sub-section confers power on the State Government to issue notification permitting the transfer of interest and such notification has been issued permitting transfer of interest of the lessee in the business premises, provided what is transferred is the running business with tenancy rights. It is, therefore, clear that even the legislature never

contemplated that the lessee of non-residential premises cannot transfer or assign the interest in the leasehold rights. The learned Judge was, therefore, not right in observing that the transfer of leasehold interest in non-residential premises is totally prohibited and therefore not liable for attachment. It was also overlooked that the grievance on account of breach of sub-section (1) of section 15 of the Bombay Rent Act can only be at the behest of the lessor and the lessee whose interest in the leasehold rights is attached cannot complain about the same. Indeed, in the present case, the Respondents have admitted on affidavit that out of above 2,000 sq. ft. of the leased area 1850 sq. ft. have already been parted with either under the cover of sub-leases or licenses. The conduct of the Respondents speak for itself and requires no further comment. The lessee has not created the alleged sub-leases and licenses for no consideration. In the absence of total prohibition of transfer of leasehold interest in respect of non-residential

premises it is not correct to suggest that the lessee of such premises do not hold saleable property or do not hold disposing power in respect of such interest".

4.1 It is thus clear that there is no bar whatsoever under sub-section (1) of section 15 to attach and sell leasehold interest of the lessee in premises leased out for non-residential purpose. It is not in dispute that said premises in instant petition were leased out for non-residential purpose.

5. The Full Bench of this court in **Tangerine Electronics Systems Pvt. Ltd., Mumbai Vs. Indian Chemicals Mumbai and Others And Shahid Shaukat Sarkar of Mumbai and Others 2004(2) Mh.L.J. 305** had an occasion to deal with the provisions of section 15 of the Rent Act and section 26 of the Maharashtra Rent Control Act, 1999 (for short "Act of 1999"). It is useful to quote paragraph 19 of the report where the Full Bench has compared both the provisions. Paragraph 19 of the report reads thus:

"19. On the comparison of section 15(1)

of the Bombay Rent Act and section 26 of the Maharashtra Rent Control Act, 1999, it would be seen that both sections are almost identical save little difference in the proviso appended to both sections which empower the State Government to permit the transfer of interest in premises by publication of notification in the official Gazette. Proviso appended to section 15(1) of the Bombay Rent Act provided that the State Government may by notification in the Official Gazette permit in any area the transfer of interest in premises held under such leases or class of leases or the giving on licence any premises or class of premises and to such extent as may be specified in the notification while the proviso appended to section 26 such notification can be issued by the State Government only for the premises other than those let for the business trade or storage. In our considered view, this difference in proviso by taking out non-residential premises out of the purview of State Government's power to permit the transfer of interest by issuance of

notification in official gazette does not make the ratio of the Division Bench in Mittersain Rupchand's inapplicable under section 26 of the Act of 1999. Even if we assume that under the proviso to section 26 of the Act of 1999, the State Government cannot permit the transfer of interest in the premises let out for business, trade or storage, the prohibition contained in section 26 being subject to the contract to the contrary does not alter the legal position that the restriction under section 26 is neither absolute nor total. We find ourselves unable to agree with the submission of Mr. Mahendra Ghelani that section 26 of the Act of 1999 provides total prohibition for transfer to the tenant and the only exception being the contract to the contrary and, therefore, the tenancy rights is not saleable".
(emphasis supplied)

5.1 After considering these provisions the Full Bench has held that clause (kc) appended to the proviso of sub-section (1) of section 60 of the Civil Procedure Code prohibits the attachment and

sale of interest of the lessee of a residential building to which the Rent Control Act applies but the said prohibition is not applicable to the interest of a tenant of a non-residential premises to which the Maharashtra Rent Control Act applies and, therefore, it can safely be held that the interest of the tenant in non-residential premises to which Act of 1999 applies is attachable and saleable in execution of a decree against the tenant. In the concluding paragraph the Full Bench held thus:

"40. We, therefore, conclude that the tenant's right to remain in occupation of the non-residential premises governed by the Maharashtra Rent Control Act, 1999 is a property; such property is saleable and the tenant has disposing power over the interest of the tenancy for his benefit and in view thereof, we hold that the interest of the tenant of non-residential premises to which the Maharashtra Rent Control Act, 1999 applies is attachable and saleable in execution of the decree against the tenant".

6. The prohibition contained in sub-section (1) of section 15 of the Rent Act was not absolute. The section nowhere provided that the transfer would be void. The proviso of sub-section (1) conferred powers on the State Government to issue notification permitting the transfer of interest of the lessee in the business premises, provided what is transferred is running business with tenancy rights. It is, therefore, clear that even Legislature never contemplated that the lessee of the non-residential premises cannot transfer or assign the interest in the leasehold rights. Proviso to section 26 of the Act of 1999 though does not specifically permit the transfer of interest in the premises let out for business, trade or storage, the prohibition contained in section 26 being subject to the contract to the contrary does not alter the legal position that the restriction under section 26 is neither absolute nor total. Proviso to section 26 provides that notification can be issued by the State Government only for the premises other than those let out for the business, trade or storage. In view thereof the Full Bench after considering the provisions of section 15 of the Rent Act and section 26 of the

Act of 1999 held that this difference in proviso by taking out non-residential premises out of the purview of the power of State Government to permit the transfer of interest by issuance of notification in official gazette does not make the ratio of the Division Bench in Mittersain Rupchand's case (supra) inapplicable under section 26 of the Act of 1999. Even if it is assumed that under the proviso to section 26 of the Act of 1999, the State Government cannot permit the transfer of interest in the premises let out for business, trade or storage, the prohibition contained in section 26 being subject to contract

to the contrary does not alter the legal position that the restriction under section 26 is neither absolute nor total. In other words the interest of the tenant in non-residential premises to which Act of 1999 applies is also attachable and saleable in execution of the decree against the tenant.

7. In view of the aforesaid judgment of this court the question raised in this writ petition must be answered in affirmative. In the result this petition is dismissed. Consequently, the Rule stands discharged.

(D.B.Bhosale, J.)

HIGH COURT AT BOMBAY
CIVIL APPELLATE SIDE

WRIT PETITION NO.2887 OF 1988

Date of Decision: 16th September 2004

For approval and signature:

The Hon'ble Mr. Justice : D. B. BHOSALE

1. Whether Reporters of Local papers may be allowed to see the judgement ?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950, or any Order made thereunder?
5. Whether it is to be circulated to the Civil Judges?
6. Whether the case involves an important question of law and whether a copy of the judgment should be sent to Nagpur Office?